CHAN YIEW HOCK

v.

KOH HONG TOONG & ANOR;
MAJLIS PEGUAM MALAYSIA (INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL APPEAL NO: R1-17B-07-2006]
5 JANUARY 2010

LEGAL PROFESSION: *Advocates and solicitors - Misconduct - Struck off from Rolls of Advocates & Solicitors - Appeal - Advocate and solicitors converting client's monies to his own use - Whether proceedings before Disciplinary Board valid and proper - Whether breach of rules of natural justice - Whether court ought to interfere*

LEGAL PROFESSION: *Disciplinary proceedings - Disciplinary Board (DB) - DB striking off advocate and solicitor from Rolls of Advocates & Solicitors - Whether DB properly constituted - Whether Chairman of DB qualified to hold office - Whether deliberations of DB chaired by Vice-President valid - Whether proceedings carried on in breach of rules of natural justice - Complainant absent from hearing - Whether DB erred in classifying case under s. 103B Legal Profession Act 1976 - Whether DB failed to caution appellant regarding intention to impose punishment more severe than that recommended by Disciplinary Committee - Whether court ought to interfere - Legal Profession Act 1976, ss. 93(3), (4), 103E(4)*

The Disciplinary Board ('DB') proceedings against the appellant stemmed from a complaint by the complainant/first respondent (the appellant's client/vendor in a sale and purchase transaction) that: (i) the appellant had charged legal fees although the appellant had not been engaged to act for the complainant in the transaction; (ii) that the appellant had charged the complainant service tax at the rate of 10% although the Government service tax was in fact 5%; (iii) that the appellant had failed to remit to the complainant the sum of RM23,200 paid to the appellant by the purchaser towards the balance purchase price; (iv) that the appellant had written letters directly to the complainant despite knowing that the latter was represented by a separate firm of solicitors; and (v) that the appellant had failed to reply to letters sent by the Complainant's Solicitors. The DB found the appellant guilty of

misconduct and imposed on the appellant various punishments ranging from fines to being struck off the Rolls of the Advocates & Solicitors. The appellant, pursuant to s. 103E(4) of the Legal Profession Act 1976 ('the LPA'), appealed against the decision of the DB. The appellant challenged the validity of the order of the DB on the following grounds: (i) the DB was not properly constituted as the Chairman ('Tan Sri Dato' Seri Khalid Ahmad'), an essential member of the DB was not qualified to hold office being appointed at a time when he was already in excess of 65 years of age in breach of s. 93(3) of the LPA read with the Federal Constitution; and (ii) that the deliberations of the DB being chaired by the Vice-President of the DB and not the Chairman was contrary to s. 93(4) LPA and was therefore invalid. The appellant's grounds of appeal were: (i) that the proceedings before the Investigating Tribunal ('IT') and the Disciplinary Committee ('DC') were carried on in breach of the rules of natural justice in that the complainant was absent and therefore the appellant was denied the right of cross-examination under rr. 15 & 17 and rr. 22 & 23 respectively of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('IT & DC Rules'); (ii) that the DB erred when it classified the case against the appellant under s. 103B LPA read together with s. 103A and had misconstrued these provisions in constituting the DC as the appellant had never been charged with particularly criminal breach of trust under s. 409 Penal Code; and (iii) that s. 103D(2) LPA was not complied with in that the DB had failed to caution the appellant that it intended to impose a punishment more severe than that as recommended by the DC.

Held (dismissing the appeal with no order as to costs):

(1) The Chairman had been in active practice for 39 years prior to his appointment and had thus fulfilled the requirement of art. 123 and rendering the age factor raised by the appellant irrelevant. The provisions of the Constitution are to be construed "with less rigidity and more generosity than other statutes" and the *maxim generalia specialibus non derogant* would apply to make art. 123(1) applicable as opposed to art. 125 when construing s. 93(3) LPA. Even if the appointment of the Chairman was invalid, this in itself would not vitiate all the acts of the DB during the tenure of his chairmanship following the proposition of law on *de facto* doctrine. *Badan Peguam Malaysia v. Kerajaan Malaysia* (refd). (para 5)

(2) The Chairman had been present in the meeting but had not taken part in the deliberation. A "quorum" need only exist at the commencement of a meeting to give the meeting legitimacy and the relevant time for consideration of whether a quorum is present is at the commencement of the proceedings or meeting. (para 6)

(3) Section 100(1) contemplates a consideration by the DB of the merits of the complaint and it is only where there are merits in the complaint that the DB constitutes and empanels an IT. The word "forthwith" in s. 100(1) is not to be read as "with immediate effect" as contended by the appellant, but read as "within reasonable time period". (para 7)

(4) There was no breach of procedural fairness in the proceedings before the DB. There is no absolute right to cross-examination implied in the rules of natural justice nor in the procedure governing disciplinary proceedings; natural justice merely dictates that the adjudicating tribunal adopt a fair procedure. The report of the IT and the DC revealed that the procedure adopted was fair as it allowed the appellant to give his version of the defence in the circumstances of the proceedings before the IT and DC. (para 8)

(5) There are two limbs to s. 103B LPA on the constitution of a DC by the DB – (i) to appoint a DC where an IT has been appointed to consider the report of the IT; and (ii) to appoint a DC to investigate and make recommendations to the DB in respect of cases under s. 103A, which includes when an advocate and solicitor has been convicted of criminal breach of trust. The appointment of the DC was made under the 1st limb of s. 103B and not the 2nd limb. (para 9)

(6) The statutory framework of s. 103D expressly allows the DB to disagree with the recommendations of the DC and to impose a more severe sentence as long as the appellant is notified and is given an opportunity to be heard. From the legislative framework of s. 103D LPA there is no requirement for the DB to give reasons for enhancing the punishment. (para 10)

(7) In disciplinary matters, the profession itself and the members are the best judge of what are the standards that the members of that profession must adhere to. The court does not readily interfere with what the profession sees as misconduct. The

A appellant had converted to his own use monies paid by the purchaser to the appellant as solicitor which is deemed misconduct. The DC had not erred in their findings of facts which warranted the court to interfere with the findings arrived at by them. (para 10)

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Case(s) referred to:

A Ravindran Aruchunan & Ors v. Nagappan Athiyan Chetty @ AT Nagappan & Ors [2001] 5 MLJ 699 ***(refd)***

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

C *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 PC* ***(refd)***

Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521 FC ***(refd)***

Bolton v. Law Society [1994] 1 WLR 512 ***(refd)***

Cheang Kok Cheow v. Setiausaha Kehormat Bagi Pertubuhan Akitek
D *Malaysia & Anor [1994] 1 CLJ 252 HC* ***(refd)***

Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***

Hillingdon London Borough Council v. Cutler [1967] 3 WLR 246 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Hoo Lin Coln v. Wong Weng Woh & Anor [2006] 3 CLJ 939 HC ***(refd)***

E *Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC* ***(refd)***

Karthigasu Arumugam v. A Selvadurai JKR Leonard [1934] FMSR Vol III 219 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

F *Marzaini Zainuddin v. Majlis Peguam Negara [2007] 8 MLJ 697* ***(refd)***

Nam Bee Rubber Estate Sdn Bhd v. Syarikat Tanaman Perak Bhd [1985] 1 LNS 140 FC ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***

R v. Royal Borough of Kensington and Chelsea, Ex p Grillo [1996] 28 HLR
G *94* ***(refd)***

Re Hartley Baird [1954] 3 WLR 964 ***(refd)***

Reg v. Secretary of State for the Home Department, Ex p. Doody [1994] 1 AC 531 ***(refd)***

Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487
H ***(refd)***

Tajjul Ariffin Mustafa v. Heng Cheng Hong [1993] 3 CLJ 117 SC ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Legislation referred to:

I Federal Constitution, arts. 5(1), 123(1), 125(1)

Interpretation Acts 1948 and 1967, s. 41(a)

Legal Profession Act 1976, ss. 93(3), (4), 100(1), 101, 102(2), 103A, 103B, 103D, 103E(4)

Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, rr. 15(a), (b), (c), 17, 22, 23, 26(2)

For the appellant - S Kanawagi; M/s Peter Cheah & Co
For the Disciplinary Board - Peter Skelchy; M/s Cheah Teh & Su
For the intervener - JD Goonting; M/s Collin Goonting & Assocs

Reported by Amutha Suppayah

JUDGMENT

Lau Bee Lan J:

[1] The appellant has pursuant to s. 103E(4) of the Legal Profession Act 1976 (Act 166) ("the LPA") appealed against the decision of the disciplinary board (DB) given on 13 January 2006 whereby basically the DB found the appellant guilty of misconduct and imposed the following punishment:

(a) Charge No. 1 – the appellant do pay a fine of RM1,000 payable within one month from the date of the order to the discipline fund.

(b) Charge No. 2 – the appellant do pay a fine of RM20,000 payable within one month from the date of the order to the discipline fund.

(c) Charge No. 3 – the appellant be struck off the Rolls of the Advocates & Solicitors of the High Court Malaya within (21) days from the date of the order.

(d) Charge No. 4 – the appellant do pay a find of RM3,000 only within one month from the date of the order to the discipline fund.

(e) Charge No. 5 – the appellant be reprimanded.
("the order of the DB").

[2] *Vide* a notice of motion dated 4 July 2006 (encl. 11) the Bar Council of Malaysia applied for leave to intervene pursuant to s. 103E(4) of the Act. I had on 20 February 2009 allowed O.I.T. of prayers (1), (2) and in respect of prayer 4, the arguments of the Bar Council, as intervener would be limited to grounds 1 to 8 set out in the Memorandum of Appeal (pp. 2 to 9 of the Appeal Record).

A For purposes of this appeal, it was agreed by the parties the provisions of the LPA before the amendments under the Legal Profession (Amendment) Act 2006 (Act A 1269) *vide* P.U.(B) 248/06 (came into force on 2 October 2006) will apply.

B **[3]** The chronology of events leading to this appeal are as follows:

	Date	Events
C	(a) 10 August 2000	DB receives official complaint from 1st respondent dated 4 August 2000 together with the annexures.
	(b) 9 December 2000	DB acknowledges receipt of the written explanation given by the appellant dated 8 December 2000 together with the annexures.
D	(c) 17 December 2004	DB met and set up IT pursuant to s. 100(1) LPA.
	(d) 22 March 2005	IT chaired by Mr Khoo Guan Huat @ 2.30pm inquired into the complaint and concluded on the same day.
E	(e) 18 May 2005	The IT inquired and on 18 May 2005 recommended that a Disciplinary Committee be convened to undertake formal investigations into the matter/ complaint.
	(f) 1 June 2005	IT submits its report and copies of documents to the DB.
F	(g) 16 July 2005	DB met and set up DC against appellant pursuant to s. 102(2) LPA.
	(h) 29 May 2005	DC headed by Mr Raymond Kwok @ 2.30pm inquired into the complaint and concluded the
G		hearing on the same day at 5pm.
	(i) 13 January 2006	DB imposes punishment.

The DB proceedings against the appellant stems from a complaint by the appellant's client (vendor in a sale and purchase
H transaction) which essentially is the following:

(1) The appellant had charged and received from complainant legal fees although the appellant had not been engaged to act for the complainant in the sale and purchase transaction;

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(2) The appellant had charged and received from the complainant service tax at the rate of 10% although the government service tax was in fact 5%;

(3) The appellant had failed to remit to the 1st respondent (vendor/complainant) the sum of RM23,200 paid to the appellant by the purchaser (the appellant's client) towards the balance purchase price;

(4) The appellant had written letters directly to the 1st respondent despite knowing that the 1st respondent was represented by a separate firm of solicitors;

(5) The appellant had failed to reply to letters sent by the 1st respondent's solicitors, Messrs Kong Kim Leng & Co.

[4] The court has considered the respective outline written submissions of the appellant (encl. A) of the intervener (encl. B) and their oral submissions, inclusive of the oral submission of Mr Peter Skelchy for the DB. The court's findings are the following.

Grounds 1 And 2

[5] The appellant challenges the validity of the order of the DB and contends that the same is invalid and a nullity for being in excess of jurisdiction as there was no legal and proper quorum of the DB due to:

(i) the DB was not properly constituted as the chairman, an essential member of the DB was not qualified to hold office being appointed at a time when the chairman was already in excess of 65 years of age in breach of s. 93(3) of the LPA read with the Federal Constitution; and

(ii) that the meeting of the DB was chaired by the Vice-President of the Bar and not the Chairman.

[5.1] It is common ground that by virtue of s. 93(3) of the LPA, the DB shall consist of a chairman, the President of the Bar Council or the Vice-President as his alternate and not less than 15 practitioner members of not less than 15 years standing. Section 93(3)(a) of the LPA envisages three categories of persons as eligible for appointment as chairman of the DB namely, "such person shall be a judge of the High Court or Supreme Court, a retired judge of the High Court or Supreme Court or any person who is qualified to be a judge of the High Court or Supreme Court." Further, it is also

not disputed Tan Sri Dato' Seri Khalid Ahmad b Sulaiman, the chairman at the material time, came under the 3rd category of persons.

[5.2] However the appellant submits that at the date of Tan Sri Dato' Seri Khalid Ahmad's appointment as chairman, he was in excess of 65 years of age and thus ineligible to hold office as a judge of the High Court or Supreme Court and cites art. 125(1) of the Federal Constitution.

[5.3] I find there is merit in the Bar Council's submission that art. 125(1) of the Federal Constitution is inapplicable as the said article deals with the tenure during which a judge of the High Court or Supreme Court may hold office whereas the issue for determination is who is qualified to be a judge of the High Court or Supreme Court which qualification is encapsulated in art. 123 of the Federal Constitution as:

(i) he is a citizen:

(ii) for ten years preceding his appointment he has been an advocate and solicitor of the Federal Court, Court of Appeal or the High Court (or any of them) or a member of the judicial and legal service of the Federation or of the legal service of a State, (or sometimes one and sometimes another).

[5.4] I agree with the Bar Council based on Tan Sri Dato' Seri Khalid Ahmad's unchallenged averment that he was admitted and enrolled as an advocate and solicitor on 22 October 1966 and has continued to practice since then and was appointed as chairman of DB on 16 February 2005 (exh. KA2), he has been in active practice for 39 years prior to his appointment and has thus fulfilled the requirement of art. 123 and rendering the age factor raised by the appellant as irrelevant. I am fortified in my interpretation as I find the Bar Council is correct when they submit that the provisions of the Constitution is to be construed "with less rigidity and more generosity than other statutes" as held in the majority judgment of the Federal Court at pp. 545, 552 553 in *Badan Peguam Malaysia v. Kerajaan Malaysia*

[2008] 1 CLJ 521 and the maxim *generalia specialibus non derogant* would apply to make art. 123(1) applicable as opposed to art. 125 when construing s. 93(3) LPA.

[5.5] In any event, even if I am to err in my finding, and the appointment of Tan Sri Dato' Seri Khalid Ahmad is invalid, I agree with the Bar Council that this in itself does not vitiate all the acts of the DB during the tenure of his chairmanship following the proposition of law on *de facto* doctrine which the Federal Court in *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195 at p. 223 stated as "This rule of public policy is encapsulated in s. 41(a) of the Interpretation Act 1967 which provides that the proceedings of a board, commission, committee or similar body established by law shall not be invalidated by any defect afterwards discovered in the appointment or qualification of a person purporting to be a member."

[6] It is common ground that pursuant to s. 93(4) LPA, the quorum of the DB shall comprise the chairman, the President of the Bar Council or the Vice-President as alternate and five members of the DB with not less than 15 years standing at the Bar. The appellant contended that the deliberations of the DB in the appellant's case being chaired by the Vice-President of the DB is contrary to s. 93(4) LPA and is therefore invalid.

I find the appellant's contention to be without merit as the minutes of the meeting on 13 January 2006 reflects the presence of the Chairman but he did not take part in the deliberation as is evident at p. 151 Appeal Record it is recorded under the heading "Members who had abstained and left the room during the deliberation of the matter" includes Tan Sri Dato' Seri Khalid Ahmad as Chairman of the DB. I agree with the Bar Council's submission that a "quorum" need only exist at the commencement of a meeting to give the meeting legitimacy and the relevant time for consideration of whether a quorum is present is at the commencement of the proceedings or meeting. This is borne out from the following cases of *A Ravindran Aruchunan & Ors v. Nagappan Athiyan Chetty @ AT Nagappan & Ors* [2001] 5 MLJ 699 at p. 713 following *Re Hartley Baird* [1954] 3 WLR 964 at. pp. 965 & 967 and *Cheang Kok Cheow v. Setiausaha Kehormat bagi Pertubuhan Akitek Malaysia & Anor* [1994] 1 CLJ 252 at pp. 254 and 255.

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Ground 3

[7] Under this ground of appeal, the appellant contends that the disciplinary proceedings were carried out in breach of LPA as the DB has failed to empanel an Investigating Tribunal ("IT") forthwith under s. 100 LPA when the complaint was made on 4 August 2004, the decision to empanel the IT was taken on 17 December 2004 and the DB's letter was dated 27 December 2004.

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[7.1] I agree with the Bar Council that the operative part of s. 100(1) reads "Where a written application is referred to the DB, the DB shall, if it considers that there is merit in the application or complaint" contemplates a consideration by the DB of the merits of the complaint and it is only where there are merits in the complaint that the DB constitutes and empanels an IT.

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[7.1] I also agree with the Bar Council's submission that the word "forthwith" in s. 100(1) is not to be read as "with immediate effect" as contended by the appellant, but read as "within reasonable time period". For this proposition I rely on:

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(a) *Hillingdon London Borough Council v. Cutler* [1967] 3 WLR 246 where the English Court of Appeal states the word "forthwith" "is not a precise time and, provided that no harm is done, "forthwith" means "any reasonable time thereafter";

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(b) *Karthigasu Arumugam v. A Selvadurai JKR Leonard* [1934] FMSR Vol III 219 the word "forthwith" is construed as "has not a fixed and absolute meaning; it must be construed with reference to the objects of the rule and the circumstances of the case";

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(c) *Nam Bee Rubber Estate Sdn Bhd v. Syarikat Tanaman Perak Bhd* [1985] 1 LNS 140 (Supreme Court) where the word "forthwith" means "without any delay or loss of time" and a word which does not imply delay but quite the reverse".

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Grounds 4 And 5

[8] Basically the appellant's grounds of appeal are:

(a) at paragraphs 4 of the Memorandum of Appeal the proceedings before the IT were carried on in breach of the rules of natural justice in that the complainant was absent and therefore the appellant was denied the right of cross-examination under rr. 15 and 17 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ("IT & DC Rules"); and

(b) at para. 5 of the Memorandum of Appeal the proceedings before the disciplinary committee ("DC") were carried on in breach of the rules of natural justice in that the complainant was absent and therefore the appellant was denied the right of cross-examination under rr. 22 and 23 of the IT & DC Rules.

I find these grounds are without basis and there is no breach of procedural fairness in the proceedings before the DB.

[8.1] The bone of contention of the appellant's complaint is whether the appellant has an absolute right of cross-examination of the complainant under the IT and DC Rules. In proceedings before the IT and DC, there is no provision for the right of cross-examination as is evident from r. 15(a)(b) and (c) and r. 22 of the IT and DC Rules respectively, save for it being expressly provided under r. 23 of the IT and DC Rules with respect to proceedings before the DC. As correctly submitted by the learned counsel for the Bar Council, Mr JD Goonting, the legislative scheme and framework for proceedings before both the IT and DC expressly provide for proceedings to be carried on in the absence of either the complainant or the respondent advocate and solicitor after the IT and DC is satisfied that notice of the inquiry had been sent to the absent party. Furthermore, I agree that r. 23 can only be given legal effect as Mr JD Goonting submitted where the complainant and the respondent advocate and solicitor attend before the DC. In the context of this appeal it is undisputed the complainant failed to attend the inquiry before both the IT and the DC and proceedings were

carried on in the absence of the complainant. In the circumstances, no cross-examination of the complainant could have taken place.

[8.2] The Bar Council submits there is no absolute right to cross-examination implied in the rules of natural justice nor in the procedure governing disciplinary proceedings; natural justice merely dictates that the adjudicating tribunal adopt a fair procedure. I agree with this proposition as it is borne out from the various authorities cited in support by Mr JD Goonting namely, *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14 and *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771.

[8.3] From a reading of the report of the IT and the DC at pp. 92 to 104 and 114 to 141 Appeal Record reveal that the procedure adopted was fair as it allowed the appellant to give his version of the defence in the circumstances of the proceedings before the IT and DC.

Ground 6

[9] Under this ground of appeal, the appellant claims that the DB has erred when it classified the case against the appellant under s. 103B LPA read together with s. 103A and has misconstrued these provisions in constituting the DC *vide* the DB's letter dated 1 August 2005 (p. 106 Appeal Record) as the appellant till the date of filing the Appeal Record has never been charged with particularly criminal breach of trust under s. 409 Penal Code.

[9.1] I find the contention of the appellant is groundless. As correctly submitted by Mr JD Goonting, there is no reference made in the said letter to s. 103B LPA read together with s. 103A; but rather to s. 102(2) and s. 103B LPA. I agree with the Bar Council that there are two limbs to s. 103B LPA on the constitution of a DC by the DB:

(i) to appoint a DC where an IT has been appointed to consider the report of the IT; and

(ii) to appoint a DC to investigate and make recommendations to the DB in respect of cases under s. 103A, which includes when an advocate and solicitor has been convicted of criminal breach of trust.

[9.2] It is an undisputed fact that the IT was constituted and empanelled on 17 December 2004; thus the appointment of the DC was made under the 1st limb of s. 103B LPA and not the 2nd limb which was wrongly cited and misconstrued by the appellant.

Ground 7

[10] Under this ground of appeal, the appellant essentially contends s. 103D(2) LPA was not complied with in that the DB has failed to caution the appellant that it intended to impose a punishment more severe than that as recommended by the DC.

[10.1] Section 103D LPA reads:

> Consideration by the Disciplinary Board of the report of the Disciplinary Committee
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> (1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order:
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> (a) affirming the recommendations of the Disciplinary Committee; and
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> (b) may either accept the recommendations of the Disciplinary Committee of the punishment to be imposed or, in exceptional cases, impose a greater punishment.
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> (2) Before the Disciplinary Board makes an order and imposes a punishment under this section which results in a greater punishment it shall notify the advocate and solicitor concerned of its intention to do so and give him a reasonable opportunity to be heard.
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> (3) Where the Disciplinary Board does not agree with the recommendations of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

A [10.2] As it is a canon of statutory interpretation of statutes that the court is to give effect to the plain meaning of the words used in the statute, I agree with the Bar Council a true construction of s. 103D LPA gives rise to the following effect:

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(a) the express words of section 103D(1)(b) LPA does not entitle the DB to impose a lesser punishment;

(b) the DB in respect of punishment is entitled to only 2 choices that is to say it either accepts the
C punishment recommended by the DC or it is free to impose a more severe punishment. Subsection (3) being a later provision that empowers the DB to "make such other order as it deems just" must be read in light of the subsection (1) and does not
D detract from the only 2 options available to the DB in subsection (1);

(c) that subsection (2) which requires the DB to notify an advocate and solicitor of the DB's intention to impose a greater punishment and to afford the
E advocate and solicitor a right to make representations to the DB must be read in the light of subsection (1).

[10.3] As a corollary, the Bar Council is correct in submitting that once the DB informs the advocate and solicitor that
F it disagrees with the punishment recommended by the DC, the advocate and solicitor is seised with knowledge that the DB intends to impose a greater and/or more severe punishment than that recommended by the DC even if the notification does not say so. I find the
G legislative intent of s. 103D LPA has been satisfied as is evident from the DB's letter (para 1 and 2 at p. 113 Appeal Record) which expressly states that the DB disagrees with the punishment recommended by the DC.

H [10.4] The appellant also argued:

(i) there is a duty entrusted upon the DB to give reasons when depriving the livelihood of a person who is protected by art. 5(1) Federal Constitution
I citing the cases of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665;

[1996] 1 MLJ 481 at 510F, 537A and 538D-E and *Rohana Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487.

(ii) the punishment imposed does not accord with the recommendations by the DC and therefore fails the test of proportionality and is unreasonable under the *Wednesbury* test.

[10.5] As alluded to earlier, the statutory framework of s. 103D expressly allows the DB to disagree with the recommendations of the DC and to impose a more severe sentence as long as the appellant is notified and is given an opportunity to be heard. In any event there is no absolute duty for a decision-maker to give reasons unless it is expressly provided for by statute. In this regard the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 cited on behalf of the Bar Council is instructive. The Federal Court endorsed the principles enunciated in the Privy Council case of *Dr Stefan v. the General Medical Council (unreported)* at p. 122 c-e "The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis (*R v. Royal Borough of Kensington and Chelsea, Ex p Grillo* [1996] 28 HLR 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers. It was reaffirmed in *Reg v. Secretary of State for the Home Department, Ex p. Doody* [1994] 1 AC 531, 564, that the law does not at present recognise a general duty to give reasons for administrative decisions. But is it well established that there are exceptions where the giving of reasons will be required as a matter of fairness and openness. These may occur through the particular circumstances of a particular case".

A [10.5.1] Even if I was to follow the case of Dr Stefan, where the Privy Council after concluding that there was no express statutory duty or implied obligation to state reasons but made an observation that giving reasons can be beneficial and assist justice. Applying the
B principles to this instant case, I find from the legislative framework of s. 103D LPA there is no requirement for the DB to give reasons for enhancing the punishment.

C [10.6] An added dimension to be considered is, it is trite that in disciplinary matters, the profession itself and the members are the best judge of what are the standards that the members of that profession must adhere to and that the Court does not readily interfere with what the
D profession sees as misconduct (See *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878, *Marzaini Zainuddin v. Majlis Peguam Negara* [2007] 8 MLJ 697 and *Bolton v. Law Society* [1994] 1 WLR 512).

E [10.7] I am also mindful that a finding of fact that the appellant has converted to his own use monies paid by the purchaser to the appellant as solicitor which is deemed misconduct. The other consideration is the aim and objective of punishment in disciplinary proceedings is two-
F fold:

(i) the punitive element to punish the offender;

(ii) to maintain the reputation and sustain public confidence in the integrity of the legal profession.

G Against this backdrop, I find there are no merits in the arguments of the appellant.

Additional Oral Submissions Of The Appellant

H **[11]** Learned counsel for the appellant submitted:

(a) for proceedings before the IT, the fact that the report of the IT was delivered on 18 May 2005 (see p. 100 Appeal Record); relying on s. 101 of the LPA that the
I IT must deliver its report not later than two months from the time the IT had commenced its investigation; and

(b) for proceedings before the DC that there has been a breach of r. 26(2) of the IT & DC Rules.

[11.1] Learned counsel for the Bar Council objected stating that these matters were not pleaded in the Memorandum of Appeal citing *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42 referred to by Zaki Tun Azmi CJ in *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573; [2008] 6 MLJ 1 at p. 14 para. [31] and *Tajjul Ariffin Mustafa v. Heng Cheng Hong* [1993] 3 CLJ 117 at 125 para. g-h right.

[11.2] I am persuaded by the Bar Council's argument that the court cannot decide on the unpleaded point as it amounts to a denial of justice. To my mind it can also unnecessarily derail proceedings.

[11.3] In the event I am wrong, with regard to the s. 101 argument, I find the report of the IT dated 18 May 2005 appears to have been delivered within the extended time period allowed by the Chairman for the IT to complete investigation from 24 March 2005 to 23 May 2005. Thus there is no breach of s. 101 LPA.

[11.4] From the chronology of proceedings at the DC stage, I find *ex facie*, as per the Bar Council's submission that the proceedings before the DC were completed (29 August 2005) and the DC report and Record of Investigation Proceedings are of even date whereas the DC's appointment being 16 July 2005, there is no breach of r. 26(2) of the IT and DC Rules which provides that the DC report together with the investigation proceedings be sent to the Director within two months from the appointment of the DC.

[12] Learned counsel for the appellant has in his submissions to the court laid emphasis on the following:

(a) that disciplinary proceedings; in particular the proceedings before the IT and the DC, both of which are tasked with fact finding bear the character of criminal proceedings;

A (b) that the findings and recommendations by the investigating tribunal and the disciplinary committee are flawed and subject to judicial intervention because, the burden and standard of proof had not been met in finding liability and the imposition of the punishment upon the appellant.

B For this, the appellant relies on the fact of the complainant being absent from and had not participated in the proceedings before the investigating tribunal and the disciplinary committee, thus it is submitted by the appellant:

C (a) there had been a denial to the appellant of the opportunity to cross-examine the complainant which amounts to a failure of natural justice; See *Hoo Lin Coln v. Wong Weng Woh & Anor* [2006] 3 CLJ 939; [2007] 1 MLJ 56 (at p. 83 para. 12 at first instance);

D (b) the IT and DC had as such, reversed the burden of proof, acted on unsworn evidence, and had not met the standard of proof which is proof beyond reasonable doubt.

E [12.1] I find there is no merit in the appellant's contentions. I am inclined to agree that disciplinary proceedings under the LPA are inquisitorial in nature or in the alternative the High Court case of *Hoo Lin Coln v. Wong Weng Woh & Anor* [2006] 3 CLJ 939 relied on by the Appellant for F the proposition that disciplinary proceedings is adversarial in nature is misplaced as it is distinguishable on the facts in its application to the statutory scheme under LPA. In the High Court case of *Hoo Lin Coln (supra)*, the complainant was present but did not give evidence and G instead the order in which the evidence was taken was reversed in that the respondent *Hoo Lin Coln* was asked to give his evidence and thereafter, the partners of the complainant gave evidence. The High Court appears to have treated the disciplinary proceedings as strictly H adversarial and in addition to other grounds disapproved the reversal of the order in which the evidence was taken and found it to be in breach of r. 23 IT & DC Rules. See *Hoo Lin Coln v. Wong Weng Woh & Anor* [2006] 3 CLJ 939; [2007] 1 MLJ 56 at p. 66 para. I, p. 83 I para 12 and p. 84 para 13.

[12.2] These considerations do not apply where the complainant, 1st respondent is absent and r. 15(b) and r. 22 permit the IT and DC respectively to proceed to hear and investigate the complaint. Therefore in such circumstances investigation must be by reference to documents already in the record and the examination of the appellant himself. Any other interpretation would do violence to the language and intent of r. 15(b) and r. 22 IT & DC Rules 1994.

[13] Ground 9 in the Memorandum of Appeal deals with the appeal on the factual matrix of the case and is contained in pp. 9-15 of the same. Essentially the contention of the appellant is the DC has made wrong findings of facts and on the evidence arrived at an erroneous conclusion. I find that the DC has not erred in their findings of facts which warrants this court to interfere with the findings arrived at by them. The DC has addressed the points raised by the appellant as per the notes of proceedings.

[14] As for the enhancement of sentence by the DB with respect to the 1st, 2nd and 3rd charges, I am mindful of the principles enunciated in *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878. I find the appellant has not shown how the DB has erred so as to warrant this court to interfere with the sentences imposed by the DB.

[15] For the foregoing reasons the appeal is dismissed with no order as to costs.